Supreme Court, U.S.
FILED

051317 APR 12 2006

OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

CORWIN GAINES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether *Apprendi* (and now *Blakley*) pose a bar to the imposition of consecutive sentences where the total punishment exceeds the highest statutory maximum on any particular count.

Whether *Apprendi* and *Blakely* Establish A New, Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The Teague Rule On Retroactivity.

LIST OF PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties. The petitioner, Corwin Gaines, is not a nongovernmental corporation.

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The judgment of the United States Court of Appeals for the First Circuit in *Gaines v. Unit*ed States (1st Cir., Docket No. 01-2678) is reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit upholding the District Court judgment was entered on January 12, 2006. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

TITLE 28 U.S.C. § 2255

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled

to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

This case originated in a criminal complaint against Corwin Gaines, Allen Franklin and Francis Turner, issued on July 10, 1996. Gaines and Franklin were arrested on July 12, 1996; and, on July 18, 1996, an indictment was returned charging Gaines in Count One with conspiracy with Franklin and Turner to possess cocaine base with intent to distribute from May 3, 1996 through July 12, 1996; and, in Counts Six through Eight, with the substantive possession of cocaine base with intent to distribute on June 13, 1996, June 20, 1996 and July 12, 1996, respectively.

The first trial of this case commenced on March 31, 1997, before the Hon. George A. O'Toole, Jr. and a jury, and was submitted to the jury for its deliberation on April 16, 1997. The jury failed to reach a verdict after five days' deliberations; a mistrial was declared on April 23, 1997. Retrial commenced on June 10, 1997, and on June 24, 1997, after deliberating for a day and a half, the jury returned a verdict of guilty on

Counts One, Seven, and Eight, and of Not Guilty on Count Six. On October 8, 1997, Gaines was sentenced to a term of 292 months imprisonment.

The Petitioner appealed the conviction, and the Appeals Court affirmed the judgment. The Petitioner filed a petition for panel rehearing, and the Appeals Court denied it. The Petitioner did not apply for a Writ of Certiorari.

The Petitioner subsequently filed a Motion To Vacate under 28 U.S.C. § 2255 (the "2255 Motion") on March 7, 2000. In response to the Motion, the Hon. George A. O'Toole, Jr. issued an Order that an answer/responsive pleading should be filed by the respondent, the United States. The government filed a response in opposition to the 2255 Motion on May 19, 2000.

In the midst of this, the Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

As a result, the Petitioner filed a Motion to Amend the 2255 Motion, to add three new Apprendi claims, on June 25, 2001. The indictment charged him in Count One with conspiracy to possess cocaine base with intent to distribute from May 3, 1996 through July 12, 1996; and, in Counts Six through Eight, with the substantive possession of cocaine base with intent to distribute on June 13, 1996, June 20, 1996 and July 12, 1996, respectively. The indictments themselves do not, however, make mention of any specific drug weight.[1]

1. The indictment merely includes a Notice of Applicability, alerting Gaines that the offenses charged in Counts One and Eight involved 50 grams or more of cocaine base such that the enhanced penalties contained in 21 U.S.C. § 841(b)(1)(A)(iii), imposing a (Cont'd)

Yet, his sentence was enhanced by the weight of the drugs which, he argues, is an *Apprendi* and *Blakely* violation. According to the Presentence Report (the "PSR"), he was held accountable for a total of 2.8 KG of cocaine base for three transactions as follows: 47.5 grams sold on 5/21/96; 21.3 grams sold on 6/20/96; and 2,748 grams found in his apartment on 7/12/96. Per the Drug Quantity Table under U.S.S.G. 2D1.1(c)(3), 1.5 KG or more of cocaine base yielded a base offense level of 38. The District Court Judge allowed the motion to amend the 2255 Motion on July 26, 2001. The government filed a motion to reconsider the allowance of the motion to amend on August 3, 2001, and the Judge denied the motion to reconsider on August 14, 2001.

The district court held a hearing on the 2255 Motion on September 25, 2001. On June 28, 2001, the Judge issued an order denying the 2255 Motion.

The Petitioner filed a timely appeal of the Order denying the motion to vacate on December 5, 2001. On February 4, 2002, the Petitioner filed an Application for Certificate of Appealability ("COA") with the District Court. On September 30, the District Court issued an Order granting COA on some, but not all, of the issues raised in the Petitioner's 2255 Motion. The Order is reproduced in the Appendix. Most importantly, for purposes of this Petition, the District Court granted COA on an Apprendi issue.

(Cont'd)
maximum life imprisonment term, applied to those counts. Gaines was further notified that Counts Six and Seven involve 5 grams or more of cocaine base such that the enhanced penalties contained in 21 U.S.C. § 841(b)(1)(B)(iii), imposing a maximum 40 year imprisonment term, applied to those counts."

The Petitioner filed an Application for Expanded COA with the Appeals Court on November 26, 2002. On February 27, 2003, the Appeals Court denied the application for an expanded COA.

The Petitioner filed a brief on appeal. In the brief, the Petitioner incorporated Blakely into his Apprendi argument in that Blakely was decided while the appeal was pending. *Blakely v. Washington*, 542 U.S. 296 (2004). The United States, in lieu of filing a brief, filed a Motion for Summary Disposition arguing, inter alia, that Apprendi and Blakely are not retroactive to cases such as this one.

On January 12, 2006, the Appeals Court entered a judgment affirming the judgement of the district court due, in large part, to the fact that, in its opinion, neither Apprendi nor Blakely are retroactively applicable to cases on collateral review.

The Petitioner remains incarcerated.

A. Basis For Federal Jurisdiction In The Court Below

The Petitioner's appeal arose from an Order on Petitioner's Motion under 28 U.S.C. § 2255 which entered on September 28, 2001 in the federal district court for the District of Massachusetts denying the Petitioner's motion for habeas corpus relief. Jurisdiction of said motion is conferred upon the federal district Court by 28 U.S.C. § 2255.

Petitioner's timely claim of appeal was entered on December 5, 2001. The federal district court issued an Order granting the Application for Certificate of Appealability ("COA") on September 30, 2002. Jurisdiction of the appeal

was, therefore, conferred upon the United States Court of Appeals for the First Circuit by 28 U.S.C. § 2255 and by 28 U.S.C. § 1291, which vests in the United States Courts of Appeals jurisdiction of appeals from all final decisions of the District Court.

ARGUMENT

1. Introduction

In this case, the Petitioner filed a 2255 Motion which he amended to contain Apprendi claims after the Supreme Court issued the Apprendi decision. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). While the case was on appeal, the Supreme Court issued the Blakely decision which prompted the Petitioner to include Blakely claims on appeal. *Blakely v. Washington*, 542 U.S. 296 (2004). The First Circuit - citing *United States v. Sepulveda*, 330 F.3d 55 (1st Cir. 2003) (holding that Apprendi is not retroactive) and citing *United States v. Cirilo-Munoz*, 404 F.3d 527 (2005) (holding that Blakely is not retroactive) - subsequently entered a judgment affirming the District Court's denial of the Petitioner's 2255 Motion on grounds that neither Apprendi nor Blakely apply retroactively. In this Writ, the Petitioner argues that they should apply retroactively, and that his unconstitutional sentence should be vacated.

The crux of the Petitioner's Apprendi claim is that, pursuant to Apprendi and Blakely, he was wrongly sentenced in that he was indicted, tried and sentenced on facts (the weight of the drugs) which were not admitted by him or found by the jury. The applicable constitutional rule, announced in Apprendi, is that, "[other] than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476. The applicable constitutional rule, announced in *Blakley*, is that, "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant (emphasis in original)." *Blakely*, 542 U.S. 296 at 303 (citations omitted).

2. Apprendi (and now Blakley) pose a bar to the imposition of consecutive sentences where the total punishment exceeds the highest statutory maximum on any particular count

When the defendant amended his 2255 Motion, he added three claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), arguing that his sentence was unconstitutional because it had been enhanced by the weight of drugs even though their weight was not stated in the indictment or mentioned in the jury instructions. The Trial Judge granted COA on the *Apprendi* issues as follows:

> In an unpublished opinion, *Saccoccia v. United States*, 42 Fed.Appx. 476, 482, 2002 WL 1734169 at **4 (1st Cir. 2002), a panel of the Court of Appeals resolved the *Apprendi* issue presented against petitioner's position. If this had been a precedential decision, there would be no need for further appellate consideration of the question. Since precedential status was not given the *Saccoccia* ruling, however, the matter must still be considered to be an open question in this

> circuit. Accordingly, the certificate of appealability is GRANTED as to this issue as well.
>
> 09/30/02 Order Granting Application for COA, Appendix.

Accordingly, the narrow Apprendi issue that was on appeal, pursuant to the parameters of the COA, was whether *Apprendi* poses a bar to the imposition of consecutive sentences where the total punishment exceeds the highest statutory maximum on any particular count.

In *Saccoccia*, the defendant sought to supplement his COA application to include a claim under *Apprendi*. *United States v. Saccoccia*, 42 Fed. Appx. 476 (1st Cir. 2002). The district court concluded that the sentences on the several counts of his convictions should run consecutively. *Saccoccia*, 42 Fed. Appx. at 482 ("The [district] court imposed the longest possible sentence on each count and ran the sentences consecutive to one another.").

But, as the Appeals Court noted in Saccoccia, "'the vice in Apprendi was the imposition of a sentence on a single count . . . in excess of the statutory maximum for that count.'" *Saccoccia*, 42 Fed. Appx. at 482 citing *United States v. Feola*, 275 F.3d 216, 220 n. 1 (2nd Cir. 2001) (per curiam). Accordingly, in *Saccoccia*'s case, "the sentencing court 'imposed the longest possible sentence on each count and ran the sentences consecutive to one another.'" *Saccoccia*, 42 Fed. Appx. at 482 citing *United States v. Saccoccia*, 58 F.3d 754, 786 (1st Cir. 1995). This was done, the Appeals Court noted, "pursuant to U.S.S.G. 5G1.2(d), which requires imposition of consecutive sentences to the extent necessary

to produce a combined sentence equal to the total punishment." *Saccoccia*, 42 Fed. Appx. at 482. *Apprendi*, the Court concluded, "poses no bar under these circumstances to the imposition of consecutive sentences under 5G1.2(d), even when 'the total punishment exceeds the highest statutory maximum on any particular count.'" *Saccoccia*, 42 Fed. Appx. at 482 (citations omitted).

The circumstance in *Saccoccia* are not, however, the same as in the Petitioner's case. In *Saccoccia*, the defendant was actually sentenced to several consecutive sentences; the Petitioner here was not. Therefore, on this key point, *Saccocia* is completely distinguishable from the Petitioner's situation.

Nonetheless, panels of at least the Fourth, Sixth, Eighth and Eleventh Circuits have all reasoned that in situations where the trial judge did not but could have imposed consecutive rather than concurrent sentences, there was no plain error. *United States v. Sturgis*, 238 F.3d 956 (8th Cir. 2001); *United States v. White*, 238 F.3d 537 (4th Cir. 2001); *United States v. Page*, 232 F.3d 536 (6th Cir. 2000); *United States v. Smith*, 240 F.3d 927 (11th Cir. 2001).

Yet, according to the 10th Circuit, "in *Apprendi*, the Supreme Court rejects a similar argument, stating that the relevant inquiry is the constitutionality of the sentence imposed on each individual count charged in the indictment, irrespective of the potential total sentence achievable through the imposition of valid consecutive sentences." *United States v. Jones*, 235 F.3d 1231, 1238 (10th Cir. 2000) citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); cf. *United States v. Price*, 75 F.3d 1440, 1446 (10th Cir. 1996).

In *Jones*, the Tenth Circuit was "concerned with the legality of the sentences actually imposed, regardless of whether in the aggregate they are less severe than the sentences that could have been imposed." *Jones*, 235 F.3d at 1238. In looking at Jones' situation, the Tenth Circuit wrote that, "[w]e will not permit our result to be guided by idle speculation as to the sentence that might be imposed by the district court on remand." *Jones*, 235 F.3d at 1238.

In fact, the Tenth Circuit stated that it "regularly has found reversible error when the sentence imposed by the district court exceeded the statutory maximum penalty applicable to the offense of conviction." *Jones*, 235 F.3d at 1238.

More specifically, in Jones, the Appeals Court found that, "the district court imposed terms of imprisonment appropriate for offenses involving at least fifty grams of cocaine base, even though *Jones* had been indicted and convicted for committing distinct offenses involving an unspecified quantity of drugs." *Jones*, 235 F.3d at 1238. "Because § 841(b)(1)(C) does not permit sentences greater than twenty years for the offenses of conviction, the sentence imposed by the district court was not authorized by the jury's guilty verdict." *Jones*, 235 F.3d at 1238. "Under our precedent, such unauthorized sentences warrant reversal." *Jones*, 235 F.3d at 1238. "We therefore conclude that the error here was not harmless, and we remand with instructions that the district court vacate the sentences for distribution and for possession with intent to distribute, and that the district court resentence the defendant for those two convictions pursuant to § 841(b)(1)(C)." *Jones*, 235 F.3d at 1238 citing *Price*, 75 F.3d at 1446.

The Petitioner in this case, whose situation is like the one in *Jones*, should receive the same result. When it comes to consecutive sentences, the judicial concern should be with the legality of the sentences actually imposed, regardless of the sentences that could have been imposed.

This position - that when it comes to consecutive sentences, it is the legality of the sentences actually imposed that matters - is that much more the right position to adopt in light of *United States v. Blakely*, 542 U.S. 296 (2004). The Supreme Court in *Blakely* explained that "the statutory maximum for [Apprendi] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant (emphasis in original)." *Blakely*, 542 U.S. 290 at 303. The Court's definition of the statutory maximum sentence in *Blakely* is not limited to the maximum sentence identified by the legislature in a criminal statute. Instead, the sentencing court is limited to the highest sentence authorized by facts found by the jury or admitted by the defendant at a plea hearing, whether those facts may be sentencing factors or the elements of the crime listed by the legislature, and whether the maximum sentence may be stated in sentencing guidelines or a statute. What matters, therefore, in terms of *Blakely*, is whether the defendant's actual sentence is constitutional. *Blakely* suggests that the Constitution requires that every fact which increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt or admitted by a defendant. In other words, *Blakely* suggests that the Constitution does not permit judges to find facts which increase applicable sentencing ranges.

The First Circuit did not, however, reach this issue in its judgement as to the Petitioner's case because it found, as a

threshold matter, that his *Apprendi* and *Blakely* claims were moot because neither case applied retroactively to the Petitioner's 2255 Motion. As is argued below, *Apprendi* and *Blakely* should be allowed to apply. And, consequently, the Petitioner's sentence should be vacated because it is unconstitutional.

3. *Apprendi* and *Blakely* Establish A New, Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The *Teague* Rule On Retroactivity

a. *Apprendi* Establishes A New, Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The Teague Rule On Retroactivity

"To date [as of 2003], at least seven United States Courts of Appeals have held that Apprendi announced a new rule, but that Apprendi's new rule does not apply retroactively to initial 2255 motions for habeas relief." *Coleman v. United States*, 329 F. 3d 77, 82 (2nd Cir. 2003) (citations omitted). However, as is argued below, Supreme Court should decide that Apprendi is retroactive.

First, in order for a new case to be one that may have a retroactive effect under *Teague v. Lane*, 489 U.S. 288 (1989), the case must announce a new rule. "In light of the dramatic changes wrought by Apprendi, it unquestionably announced a new rule of law." *Coleman*, 329 F.3d at 83 (citations omitted).

Second, given that *Apprendi* announced a new rule of law, it must be determined whether the rule is substantive or

procedural. *Coleman*, 329 F.3d at 83. New substantive rules apply retroactively on habeas review. *Bousley v. United States*, 532 U.S. 614, 619-621 (1998). But, "[in] Apprendi, the Court clearly indicated that it was announcing a procedural rule." *Coleman*, 329 F.3d at 84. The Petitioner would not disagree.

As such, given that Apprendi is a new procedural rule, the question becomes whether either of Teague's narrow exceptions applies. "There are 'two narrow exceptions' to Teague's general bar against retroactive habeas relief for procedural errors." *Coleman*, 329 F.3d at 88 (citations omitted).

Of the two exceptions, the one that is applicable to the case at bar is whether the new rule is a watershed rule of criminal procedure that is necessary to the fundamental fairness of the criminal proceeding. *Coleman*, 329 F.3d at 88. *Apprendi*, as seen by Justice O'Connor, is a 'watershed' rule of criminal procedure. *See Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting) ("Today, in what will surely be remembered as a *watershed* change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones.") (emphasis added).

This, the second Teague exception, states that the rule should be applied retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty. *Teague*, 489 U.S. at 307. Such a rule vindicates two discrete concerns: the fundamental fairness of the underlying proceeding; and, the accuracy of that underlying criminal proceeding. *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

The *Teague* Court explained that it was adapting a rule previously proposed by Justice Harlan, combining the accuracy element of *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting), and the fundamental fairness concerns of *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring). *Teague*, 489 U.S. at 312.

The reasonable doubt element of *Apprendi* is precisely the type of rule covered by *Teague*'s second exception. *See generally* Rethinking Retroactivity, 118 HARV.L.REV. 1642 (2005) (tracing the roots of cases requiring retroactivity and opining that *Apprendi/Blakely* should apply retroactively).

This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004) demonstrates that the reasonable doubt standard is both fundamental and necessary to accuracy in criminal cases. In *Schriro*, the Court concluded that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which applied Apprendi to Arizona's capital sentencing scheme, does not apply retroactively under Teague. The Court began by reiterating *Teague*'s second exception for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 352.

The Court proceeded to parse these requirements: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which he likelihood of an accurate conviction is seriously diminished.'" *Schriro*, 542 U.S. at 352 (citation omitted). The Court went on to examine and reject the Ninth Circuit's conclusion that Ring fell within the second *Teague* exception,

concluding that judicial fact-finding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Schriro*, 542 U.S. at 355-356.

The key to *Schriro*'s effect on the present case is its recognition of the fundamental role that the reasonable doubt standard plays in assuring accuracy in criminal proceedings. The Court had no question that Apprendi rights were "fundamental." *Schriro*, 542 U.S. at 355-357. The question became whether the difference between judicial and jury fact finders jeopardized the accuracy of convictions sufficiently to require retroactive application of the new rule. The analysis of the competing strengths and weaknesses of fact finders was premised upon the finding beyond a reasonable doubt. The jury trial right only applied prospectively because judicial fact finding beyond a reasonable doubt adequately protected accuracy. With only a preponderance standard, the protection of accuracy is as lacking as the right to a jury.

In many other contexts before *Schriro*, the Supreme Court has emphasized the central role of the reasonable doubt standard in protecting the rights of the accused and the accuracy of criminal convictions. In finding that reasonable doubt instructional error could not be harmless, the Court articulated the vital role of the reasonable doubt standard in avoiding convictions based on factual error. *Cage v. Louisiana*, 498 U.S. 39 (1990). In *Winship*, the Court stated that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U.S. 358, 363 (1970). "[I]t is a prime instrument for reducing the risk of convictions resting on factual error." *Cage*, 498 U.S. at 39-40 (1990). The reasonable doubt standard is an interest of "transcending value." *Winship*, 397 U.S. at 364; accord *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

As such, *Apprendi* establishes a new, watershed rule of constitutional procedure that should be applied retroactively under the *Teague* rule on retroactivity because the reasonable doubt element of *Apprendi* is precisely the type of rule covered by Teague's second exception.

c. *Blakely* Establishes A New, Watershed Rule Of Constitutional Procedure That Should Be Applied Retroactively Under The *Teague* Rule On Retroactivity

Similarly, *Blakely* represents a new constitutional rule of criminal procedure under *Teague v. Lane*, 489 U.S. 288, 299- 301 (1989) which this Court should apply retroactively. *See generally* Is *Blakely v. Washington* Retroactive?, 27 CARDOZO L. REV. 424 (2005); Justice for All: Analyzing Blakely Retroactivity and Ensuring Just Sentences in Pre-Blakely Convictions, 66 OHIO ST. L. J. 875 (2005); Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System, 2005 WIS. L. REV. 1139 (2005).

First, *Blakely* is a new rule. *See United States v. Price*, 400 F.3d 844 (10th Cir. 2005).

Second, like *Apprendi*, it is a watershed rule. In *Teague*, the Court recognized the general principle that new procedural rules are not applied retroactively to cases on collateral review, but identified an exception for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. *Teague*, 489 U.S. at 311.

Many courts, however, are relying on one decision, *Schriro v. Summerlin*, 542 U.S. 348 (2004), in deciding that

a change in the law requiring that juries, rather than judges, make the factual findings on which a sentence is based does not announce a watershed rule of criminal procedure. *See, e.g., Price*, 400 F. 3d at 848-849. But, the holding in Schriro should not prevent such a determination in this case.

In *Schriro*, decided the same day as Blakely, the Supreme Court ruled that *Ring v. Arizona*, 536 U.S. 584 (2002) is not retroactively applicable to cases on collateral review. The Supreme Court in *Ring* applied Apprendi to require jury findings of aggravated facts supporting a death sentence, but the only issue in that case involved the identity of the fact finder, since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. *Ring*, 536 U.S. at 609. In turn, Schriro involved the finder of fact but not the standard of proof. Writing for the majority, Justice Scalia states in *Schriro* that "[t]he right to jury trial is fundamental to our system of criminal procedure," *Schriro*, 542 U.S. at 358, and as the dissenting justices note, "[t]he majority does not deny that *Ring* meets the first criterion of Teague, that its holding is 'implicit in the concept of ordered liberty.'" *Schriro*. 542 U.S. at 359. The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate finders of fact, but "whether judicial fact finding so 'seriously diminishe[s]' accuracy that there is an 'impermissibly large risk'" of punishing conduct the law does not reach." *Schriro*, 542 U.S. at 355 - 356 (citations omitted). The Schriro Court found the evidence to be "simply too equivocal to support that conclusion." *Schriro*, 542 U.S. at 356.

In contrast to Ring, Blakely's application to the federal Sentencing Guidelines requires jury findings beyond a reasonable doubt. The Supreme Court explained the crucial nature of this right in *Winship*:

> The reasonable-doubt standard plays a vital rule in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error . . . "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.
>
> . . .
>
> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value——as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact finder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.

In re Winship, 397 U.S. at 363-64 (1970) (citations omitted).

A defendant who exercises the right to jury trial is also protected by the right to confront witnesses, to remain silent, to compel the presence of witnesses and to present a defense, as well as evidentiary rights such as hearsay rules. If a defendant pleads guilty, proceedings under Fed. R. Crim. P. 11 require the court to obtain a waiver from the defendant of those rights explicitly and in person. As recognized by the Court in Blakely, the right not to have one's maximum sentence substantially increased absent these protections is equally as crucial to liberty and due process as the right not to be convicted without such protections. The reasonable doubt standard, so described, "is a prime instrument for ensuring the accuracy of any conviction." Is *Blakely v. Washington* Retroactive?, 27 CARDOZO L. REV. 424, 451 (2005). "It also implicates fundamental fairness because the accused would face a severe disadvantage if he could be convicted and imprisoned based only on a preponderance of the evidence." *Id.* "Like the right to counsel, which is a bedrock rule essential to fundamental fairness, the reasonable doubt standard is a bedrock rule vital to accurate resolution of all criminal cases." *Id.*

Accordingly, this Court should find that *Blakely*, in contrast to *Ring*, recognizes a new watershed rule of constitutional procedure applicable to cases pending on collateral review.

d. Summary

For the above-cited reasons, the Supreme Court should take this opportunity to decide that *Apprendi* and *Blakely* both apply retroactively to cases on collateral review. Unless and until the Supreme Court exercises its supervisory power as such, the lower courts will undoubtably continue to hold that

these important cases are not retroactive which, as in argued herein, is unfair. As of now, a Petitioner such as Corwin Gaines, who in this regard is the victim of nothing more than bad timing in that his case became final before the *Apprendi* and *Blakely* decisions issued, is left unable to advance viable constitutional challenges to his conviction simply because the current laws regarding habeas petitions and retroactivity are so limiting. As was so well predicted in Justice Brennan's dissent in *Teague*, good habeas issues, such as the Petitioner's, are being quashed ab initio by the modern draconian landscape of retroactivity as applied to habeas corpus petitions. *See Teague*, 489 U.S. at 325-346 (Brennan, J., dissenting). In recognition of this inherent unfairness, the Supreme Court should decide that these cases do apply retroactively; and, in so doing, should decide that the Petitioner's sentence is unconstitutional.

CONCLUSION

For the reasons stated above, the petition for a writ certiorari should be granted and the case set down for argument.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED JANUARY 12, 2006

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 01-2678

CORWIN GAINES,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Lynch, Lipez and Howard
Circuit Judges.

JUDGMENT

Entered: January 12, 2006

Petitioner Corwin Gaines appeals from the judgment of the district court denying his motion filed under 28 U.S.C. § 2255, and the government has filed a motion for summary disposition. We have carefully reviewed petitioner's brief, the government's motion, and the record and agree with the government that summary disposition is appropriate in this case.

First, neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), nor *Blakely v. Washington*, 542 U.S. 296 (2004), are retroactively applicable to cases on collateral review. *See Sepulveda v. United States*, 330 F.3d 55, 57, 59-63 (1st Cir. 2003) (holding that *Apprendi* cannot be applied retroactively to cases on collateral review); *Cirilo-Munoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005) (holding the same regarding *Blakely*).

Second, the district court was not required to provide discovery or an evidentiary hearing on petitioner's ineffective assistance of counsel claims, neither of which, we note, was supported by *any* factual allegations. As for discovery, it is plain that petitioner essentially wished to go on a fishing expedition in the hopes that he might net some facts to support his claims. Such a speculative hope, however, is an insufficient basis on which to premise discovery. *See DeVincent v. United States*, 632 F.2d 145, 146 (1st Cir. 1980) (where the petitioner was "merely speculating" and had no proof that the full grand jury had not voted on the actual terms of the indictment against him, the district court was not required to permit a "fishing expedition" so that such a claim possibly could be established). For the same reasons, the district court also was not required to hold an evidentiary hearing on these conclusory claims. *See David v. United States*, 134 F.3d 470, 477-78 (1st Cir. 1998) (affirming the denial of an evidentiary hearing where the § 2255 claim "is inadequate on its face, or . . . the movant's allegations need not be accepted as true because they state conclusions instead of facts") (internal quotation marks and citations omitted).

Appendix A

The judgment of the district court is *summarily affirmed*. *See* Local Rule 27(c). All pending motions are *denied* as moot.

By the Court:
Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-CV-10446-GAO

CORWIN GAINES,

Petitioner

v.

UNITED STATES,

Respondent.

ORDER GRANTING APPLICATION FOR CERTIFICATE OF APPEALABILITY
September 30, 2002

O'TOOLE, D.J.

This Court denied the petitioner's motion under 28 U.S.C. § 2255 to vacate his sentence, and he now applies for a certificate of appealability as required by 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b). For the following reasons, the application is GRANTED.

The application enumerates fifteen issues that the petitioner seeks to present on appeal from the denial of the

§ 2255 motion, but the issues really fall into three groups: claims of ineffective assistance by the petitioner's trial counsel, claims seeking to take advantage of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and claims regarding procedural rulings concerning the disposition of his § 2255 motion.

On direct appeal, *see United States v. Gaines*, 170 F.3d 72 (1st Cir. 1999), the petitioner argued that the trial court had committed error in several different evidentiary rulings. His judgment of conviction was affirmed. In his § 2255 motion, he recast those arguments to argue that his trial counsel had rendered constitutionally ineffective assistance by failing to make a presentation sufficient to forestall the trial court's rulings on the same issues presented in the direct appeal. He also claimed ineffective assistance of trial counsel in failing to advise him properly concerning an alleged plea offer from the government. In denying his § 2255 motion, this Court rules that, because he had not presented the ineffective assistance claims on direct appeal when he was represented by new counsel, he was procedurally foreclosed from raising them for the first time in a motion under § 2255.

This Court also rejected the petitioner's *Apprendi* claims, ruling that (1) the *Apprendi* rule has not been made retroactive by the Supreme Court and (2) even if it applied, it was not violated by the imposition of consecutive sentences under § 5G1.2(d) of the United States Sentencing Guidelines.

Finally, this Court denied his motion for discovery and for an evidentiary hearing in aid of his § 2255 motion.

Appendix B

While some circuits have held that claims of ineffective assistance of trial counsel can be procedurally defaulted by failure to present them in a direct appeal when the petition was represented by new counsel on appeal and when the alleged errors are discernible in the trial record, *see Billy-Eko v. United States*, 8 F.3d 111, 115-116 (2d Cir.1993), the question has not been definitively answered in this circuit. Accordingly, the question is debatable by jurists of reason, and it is appropriate for appellate consideration. The certificate is GRANTED as to that issue, as well as to the related issues whether discovery and an evidentiary hearing ought to have been allowed.

In an unpublished opinion, *Saccoccia v. United States*, 42 Fed.Appx. 476, 482, 2002 WL 1734169 at **4 (1st Cir. 2002), a panel of the Court of Appeals resolved the *Apprendi* issue presented against the petitioner's position. If this had been a precedential decision, there would be no need for further appellate consideration of the question. Since precedential status was not given to the *Saccoccia* ruling, however, the matter must still be considered to be an open question in this circuit. Accordingly, the certificate of appealability is GRANTED as to this issue as well.

It is SO ORDERED.

September 30, 2002	s/ [illegible]
Date	District Judge